

SERVED: December 18, 1992

NTSB Order No. EA-3753

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 17th day of December, 1992

_____)	
THOMAS C. RICHARDS,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-12821
v.)	
)	
LARRY R. RIVERS,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The Administrator has appealed from the oral initial decision Administrative Law Judge William R. Mullins issued in this proceeding on November 19, 1992, at the conclusion of an evidentiary hearing.¹ By that decision, the law judge affirmed in part an emergency order of the Administrator revoking the

¹An excerpt from the hearing transcript containing the decision is attached.

respondent's private pilot certificate for several alleged violations of the Federal Aviation Regulations (FAR). On appeal, the Administrator contends that the law judge erred in reducing the sanction for the violations he sustained from revocation to an eight month suspension.² For the reasons explained below, we agree.

The October 27, 1992 Amended Emergency Order of Revocation, which served as the complaint in this proceeding, alleged, among other things, the following facts and circumstances concerning the respondent:

1. You are now, and at all times hereinafter mentioned were, the holder of Private Pilot Certificate No. 002186136.

2. During the period from August 2, 1992, through August 7, 1992, you removed all but the pilot's seat from civil aircraft N8070Z, a Cessna Model U-206, an aircraft having a

²Respondent did not appeal from the law judge's decision, but he has filed a reply brief opposing the Administrator's appeal. In addition, the respondent has filed two motions to dismiss the Administrator's appeal. Those motions are denied. The Administrator's notice of appeal, filed on November 23, was not untimely. Since the two day period after the initial decision was rendered ended on a Saturday, the Administrator had until the next business day to file his notice under Section 821.10 of our rules of practice. See Administrator v. Carter, NTSB Order No. EA-3730 at 3, n. 4 (served November 6, 1992).

Similarly, the Administrator's appeal brief was not untimely. Insofar as our rule on service is concerned, the brief was mailed when it was deposited at the post office, without regard to the date of the postmark. See Section 821.8(h). The postmark can easily be the next day if the mailing is made after the last pickup. Counsel for the Administrator avers that at about 10 p.m. on November 24 he placed the pleading in the collection box inside the postal station at the Anchorage International Airport. This provides an adequate explanation for the discrepancy between the dates on the certificate of service and the postmark, to the extent the date on the latter raised an issue as to the actual date the brief was served by mail.

U.S. airworthiness certificate.

3. The removal of seats from civil aircraft N8070Z constitutes maintenance.

4. Subsequent to the maintenance referenced in paragraph 2 but prior to September 2, 1992, you did not make an entry in the maintenance records for civil aircraft N8070Z containing the information specified in §43.9 of the Federal Aviation Regulations regarding the removal of the seats.

5. Subsequent to the maintenance referenced in paragraph 2 but prior to September 2, 1992, civil aircraft N8070Z was not approved for return to service by a person authorized under §43.7 of the FAR.

6. During the period from August 7, 1992, through September 1, 1992, you served as the pilot in command of civil aircraft N8070Z on six passenger carrying flights operated in air commerce within the State of Alaska.

* * * * *

8. During each of the [six flights referenced in paragraph 7], there were no seats available for the passengers.

9. Prior to each of the flights referenced above, you failed to brief your passengers on the use of seat belts, and you failed to ensure that each passenger was notified to fasten his safety belt before each takeoff and landing.

10. During [four of the six referenced flights], seatbelts were not available for the passengers.

11. At the time of the flight [respondent operated on September 1, 1992, from Red Sheep Creek, Alaska to White Lake, Alaska, with two passengers aboard], civil aircraft N8070Z was significantly in excess of its maximum certificated takeoff weight.

The law judge found that the conduct complained of in paragraphs 2 through 5 had not been shown to establish the violations of FAR

sections 91.407(a)(1) and (2) and 43.9(a). However, he found that the allegations in paragraphs 6 through 11 had been proved and that they supported the charges that respondent had violated FAR sections 91.9(a), 91.13(a), and 91.107(a).³ Based on the dismissal of the charges related to the seat removal and on his view that respondent's conduct had been only careless, not reckless, the law judge, as noted supra, modified the sanction to provide for an eight month suspension.

The law judge's determination that respondent's conduct was not reckless was not predicated on an analysis of the seriousness of respondent's conduct. Rather, it appears to reflect the law

³FAR sections 91.9(a), 91.13(a), and 91.107(a) provide as follows:

"§91.9 Civil aircraft flight manual, marking, and placard requirements.

(a) Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual, markings and placards, or as otherwise prescribed by the certificating authority of the country of registry.

§91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§91.107 Use of safety belts.

(a) No pilot may take off a U.S.-registered civil aircraft (except an airship or free balloon that incorporates a basket or gondola) unless the pilot in command of that aircraft ensures that each person on board is briefed on how to fasten and unfasten that person's safety belt and shoulder harness, if installed. The pilot in command shall ensure that all persons on board have been notified to fasten their safety belt and shoulder harness, if installed, before takeoff or landing."

judge's belief that flying overweight is so common in Alaska that it cannot be considered as hazardous as it would be elsewhere. We agree with the Administrator that respondent's alleged violation is no less egregious because overweight flights may be a widespread practice where he operates. Moreover, we not only think that the law judge's reasoning is invalid, we think it fails to take into account that respondent's conduct is condemnable for several reasons. First, respondent jeopardized his two employee passengers by making a takeoff from a relatively short, gravel airstrip when his aircraft was at least 200, and perhaps more than 900, pounds over its maximum certificated takeoff weight, and where much of the aircraft's load consisted of unsecured cargo. Second, he did so when his passengers did not have access to seat belts, a circumstance that is especially grievous given the elevated risk of harm the overweight takeoff entailed.

In addition, we think the law judge overlooked the abundant evidence tending to show the intentional nature of respondent's conduct. We note, in this connection, the testimony of witnesses about their preflight concern that there was too much cargo for one planeload and the tension that respondent's apparent disagreement on the matter created. Indeed, it is difficult to read the transcript without concluding that the respondent knew full well that the aircraft would be significantly overweight, but that he decided against making more than one trip to transport hunting gear and employees from the camp site because

of the costs he would incur.

For all of the foregoing reasons, we are persuaded that respondent's operation on September 1, 1992 was reckless within the meaning of section 91.13(a), that he exhibited a gross disregard for the safety of his passengers, and that the violations sustained by the law judge establish that the respondent lacks the care, judgment, and responsibility required of a certificate holder. Revocation is therefore the appropriate sanction.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The initial decision is affirmed, except to the extent it modified the sanction imposed in the Administrator's order;
and
3. The revocation of respondent's private pilot certificate is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.